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**Wynn Las Vegas, LLC and Nfinite Entertainment, Inc.
and Michael Greenfield.** Cases 28–CA–210838
and 28–CA–212152

March 19, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND KAPLAN

The General Counsel seeks default judgment against one of the Respondents, Nfinite Entertainment, Inc. (Respondent Nfinite), on the ground that it failed to file an answer to the complaint. Upon a charge and an amended charge filed by Michael Greenfield (Greenfield) in Case 28–CA–212152 against Respondent Nfinite, and upon a charge filed by Greenfield in Case 28–CA–210838 against Respondent Wynn Las Vegas (Respondent Wynn), the General Counsel issued a consolidated complaint on February 20, 2018,¹ alleging that the Respondents violated Section 8(a)(1) of the Act. On May 25, the General Counsel issued an amendment to the consolidated complaint. Respondent Wynn filed an answer, but Respondent Nfinite failed to do so.

On October 9, the General Counsel filed a Motion for Default Judgment against Respondent Nfinite.² Thereafter, on October 12, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion for default judgment should not be granted. Respondent Wynn and Respondent Nfinite each filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board’s Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The consolidated complaint stated that unless an answer was received by March 6, 2018, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true. Additionally, the amendment to the consolidated complaint stated that unless an

answer was received by June 8, the Board may find, pursuant to a motion for default judgment, that the allegations in the amendment to the complaint are true. Further, the General Counsel’s motion discloses that the Region, by letter dated June 22, advised Respondent Nfinite that unless its answer was received by June 29, a motion for default judgment would be filed against it. Respondent Nfinite neither filed an answer nor requested an extension of time to do so by June 29. It submitted an answer on October 26 together with its response to the Notice to Show Cause.

Section 102.2(d) of the Board’s Rules and Regulations provides that answers to a complaint “may be filed within a reasonable time after the time prescribed by these Rules only upon good cause shown based on excusable neglect and when no undue prejudice would result.” Here, Respondent Nfinite did not file an answer until October 26, 17 weeks after the June 29 deadline set forth in the Region’s June 22 letter.

In its response to the Notice to Show Cause, Respondent Nfinite states that it did not retain counsel until June 11, and it further states that at some time after July 23, it contacted the Region and promised that its answer was forthcoming. We find these statements unavailing. “[M]erely being unrepresented by counsel does not establish a good-cause explanation for failing to file a timely answer.” *Sage Professional Painting Co.*, 338 NLRB 1068, 1068 (2003). Additionally, Respondent Nfinite did not request an extension of time to file an answer. It is well established that the “failure to promptly request an extension of time to file an answer is a factor demonstrating lack of good cause.” *Day & Zimmerman Services*, 325 NLRB 1046, 1047 (1998); see also *V. Garofalo Carting*, 362 NLRB No. 170, slip op. at 1 (2015); *Dong-A Daily North America*, 332 NLRB 15, 16 (2000). Moreover, Respondent Nfinite does not explain its failure to file an answer promptly after its purported contact with the Region sometime after July 23.³ Accordingly, we find that Respondent Nfinite has not demonstrated good cause for failing to file a timely answer. Therefore, in the absence of good cause, and as the Respondent was represented by counsel prior to the filing of the General Counsel’s motion, the Respondent’s untimely answer cannot defeat default judgment and is therefore rejected. See, e.g., *Electra-Cal Contractors*, 339 NLRB 370, 371 (2003).

¹ All dates are in 2018 unless noted otherwise.

² The motion specifically requests default judgment only with respect to complaint allegations as they relate to Respondent Nfinite. The motion does not seek default judgment with respect to any allegations as they relate to Respondent Wynn. Accordingly, the findings of fact made and conclusions of law reached herein may not be used in any manner

that would prejudice Respondent Wynn in its defense in Case 29-CA-210838. See generally *Brisben Development, Inc.*, 344 NLRB 400, 400 fn. 1 (2005).

³ Although Respondent Nfinite notes in its response that the hearing in this case was continued from September 11 until November 14, it does not state that the continuance impacted its failure to file an answer.

Having found that Respondent Nfinite failed to establish good cause, we grant the General Counsel's motion for default judgment on certain allegations as they relate to Respondent Nfinite. Specifically, we grant default judgment against Respondent Nfinite as to paragraphs 1(b) and (c), alleging the filing of the charges against Respondent Nfinite; paragraphs 2(e), (f), and (g), alleging that Respondent Nfinite is an employer engaged in commerce; paragraphs 3(b) and (c), alleging that Jason Deborski is Respondent Nfinite's CEO and supervisor and that Amy Lee Myers is Respondent Nfinite's Labor Assistant and agent; paragraph 4(a), alleging that Respondent Nfinite's employee Michael Greenfield engaged in protected concerted activities with other employees of Respondent Nfinite; paragraph 4(d), alleging that Respondent Nfinite, by Jason Deborski, threatened to cease dispatching employees because they engaged in protected concerted activities; paragraphs 4(f), (h), and (j), alleging that Respondent Nfinite temporarily and later permanently ceased dispatching Greenfield to Respondent Wynn's facility because he engaged in protected concerted activities and to discourage employees from engaging in concerted activities; and paragraphs 5 and 6 insofar as they allege that Respondent Nfinite's conduct violated Section 8(a)(1) of the Act.

However, we deny default judgment with respect to the allegations in paragraph 4(l), set forth in the amendment to the consolidated complaint. Paragraph 4(l) alleges that Respondent Nfinite failed to dispatch Greenfield because he violated a rule or directive described in paragraph 4(b) of the consolidated complaint. Paragraph 4(b) alleges that Respondent Wynn prohibited its employees from talking about a mass shooting that occurred at a nearby hotel and casino while permitting them to talk about other nonwork subjects. Respondent Wynn's answer to the complaint denied complaint paragraph 4(b), and the General Counsel does not seek default judgment on paragraph 4(b). Because the allegations in paragraph 4(l) implicate the allegations in paragraph 4(b), we find that default judgment is not warranted as to paragraph 4(l), and we shall remand this allegation to the Regional Director for further appropriate action.

Accordingly, in the absence of good cause shown for Respondent Nfinite's failure to file a timely answer to the complaint and amendment to the complaint, we deem the allegations in paragraphs 1(b), 1(c), 2(e), 2(f), 2(g), 3(b), 3(c), 4(d), 4(f), 4(h), 4(j), 5, and 6 to be admitted as true as they relate to Respondent Nfinite, and we grant the General Counsel's Motion for Default Judgment against

Respondent Nfinite as to these paragraphs of the complaint.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent Nfinite has been a Nevada corporation with an office and place of business in Las Vegas, Nevada, and has been engaged in providing audio-visual services in the entertainment industry to clients, including Respondent Wynn. During the 12-month period ending December 26, 2017,⁴ Respondent Nfinite, in conducting its operations described above, purchased and received at its Las Vegas, Nevada facility goods valued in excess of \$50,000 directly from points outside the State of Nevada.

We find that Respondent Nfinite is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Jason Deborski held the position of Respondent Nfinite's chief executive officer and has been a supervisor of Respondent Nfinite within the meaning of Section 2(11) of the Act and an agent of Respondent Nfinite within the meaning of Section 2(13) of the Act. In addition, at all material times, Amy Lee Myers held the position of Respondent Nfinite's Labor Assistant and has been an agent of Respondent Nfinite within the meaning of Section 2(13) of the Act.

From about October 1 through about October 28, Respondent Nfinite's employee Michael Greenfield engaged in concerted activities with other employees for the purpose of mutual aid and protection by raising concerns with other employees and through the news media and social media about terms and conditions of employment, including a mass shooting that occurred while he was working for another employer and retaliation against him for his communication through the news media.

About October 26, Respondent Nfinite, by Jason Deborski, via text message, threatened to cease dispatching its employees to jobs because they engaged in protected concerted activities.

Also about October 26, Respondent Nfinite temporarily ceased dispatching Greenfield to Respondent Wynn's facility.

About October 28, Respondent Nfinite permanently ceased dispatching Greenfield to Respondent Wynn's facility.

Respondent Nfinite engaged in the conduct described above because Greenfield engaged in protected concerted

⁴ All dates hereafter are in 2017 unless noted otherwise.

activities and to discourage employees from engaging in these or other concerted activities.

CONCLUSION OF LAW

By threatening to cease dispatching employees to jobs because they engaged in protected concerted activities and by temporarily and later permanently ceasing to dispatch Greenfield to Respondent Wynn's facility because he engaged in protected concerted activities and to discourage employees from engaging in these or other concerted activities, Respondent Nfinite has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act. Respondent Nfinite's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent Nfinite has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that Respondent Nfinite violated Section 8(a)(1) by failing to dispatch Greenfield because of his protected concerted activities, we shall order Respondent Nfinite to offer to resume dispatching him to his former job⁵ or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.⁶ Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), we shall also order Respondent Nfinite to compensate Greenfield for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest

at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.⁷

In addition, we shall order Respondent Nfinite to compensate Greenfield for any adverse tax consequences of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 28 allocating backpay to the appropriate calendar year(s). *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). Respondent Nfinite shall also be required to remove from its files any and all references to the unlawful refusal to dispatch Greenfield and to notify him in writing that this has been done and that the unlawful conduct will not be used against him in any way.

ORDER

Respondent Nfinite Entertainment, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to cease dispatching employees to jobs because they engaged in protected concerted activities.

(b) Failing to dispatch or otherwise discriminating against employees because of their protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer to resume dispatching Michael Greenfield to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Michael Greenfield whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(c) Compensate Michael Greenfield for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed,

⁵ Because the allegations against Respondent Wynn are not the subject of this motion for default judgment, we leave to compliance the determination -- upon the conclusion of the proceedings against Respondent Wynn in Case 28-CA-210838 -- of the specifics of any obligation to resume dispatching Greenfield to his former position at Respondent Wynn.

⁶ Because none of the findings herein are binding on Respondent Wynn, we do not pass on any issues of joint and several liability for Greenfield's backpay, search-for-work, or other make-whole relief, as any such determination is dependent on the outcome of the allegations against Respondent Wynn. See *Local 225, United Security Guards of*

America (Planned Building Services, Inc.), 345 NLRB No. 18, slip op. at 1 fn. 4 (2005), and cases cited therein.

⁷ The General Counsel seeks a make-whole remedy that includes reasonable consequential damages incurred as a result of Respondent Nfinite's unfair labor practices. The relief sought would require a change in Board law. Having duly considered the matter, we are not prepared at this time to deviate from our current remedial practice. Accordingly, we decline to order this relief at this time. See, e.g., *Omnisource Corp.*, 366 NLRB No. 23, slip op. at 1 fn. 2 (2018); *Laborers' International Union of North America, Local Union No. 91 (Council of Utility Contractors)*, 365 NLRB No. 28, slip op. at 1 fn. 2 (2017).

either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure to dispatch Greenfield, and within 3 days thereafter, notify him in writing that this has been done and that the unlawful actions will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 26, 2017.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the General Counsel's motion for default judgment is denied with respect to the allegations concerning Respondent Nfinite in paragraph 4(l) of the amendment to the consolidated complaint, and that this allegation is remanded to the Regional Director for Region 28 for further appropriate action.

IT IS FURTHER ORDERED that all complaint allegations as they relate to Respondent Wynn are remanded to the Regional Director for Region 28 for further appropriate action.

Dated, Washington, D.C. March 19, 2019

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT threaten to cease dispatching you to jobs because you engaged in protected concerted activities.

WE WILL NOT fail to dispatch or otherwise discriminate against you because of your protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer to resume dispatching Michael Greenfield to his former job or, if that job no longer exists, to a

⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the

United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Michael Greenfield whole for any loss of earnings and other benefits resulting from our unlawful refusal to dispatch him, less any net interim earnings, plus interest, and WE WILL also make Michael Greenfield whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Michael Greenfield for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful failure to dispatch Greenfield, and WE WILL within 3 days thereafter, notify him in writing that this has been done and that our unlawful actions will not be used against him in any way.

NFINITE ENTERTAINMENT, INC.

The Board's decision can be found at <https://www.nlr.gov/case/28-CA-212152> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

